No. 95-1402 (8)

Supreme Court, U.S.
FILED
AUG 6 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ESTATE OF OTIS C. HUBERT, DECEASED, C & S SOVERAN TRUST COMPANY (GEORGIA) N.A., A NATIONAL BANKING ASSOCIATION, CO-EXECUTOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMICUS CURIAE THE TAX SECTION OF THE FLORIDA BAR IN SUPPORT OF RESPONDENT

JERALD DAVID AUGUST
Counsel of Record
JAMES J. FREELAND
AUGUST, COMITER, KULUNAS & SCHEPPS, P.A.
Attorneys for Amicus Curiae The Tax Section of the Florida Bar
250 Australian Avenue South
Suite 1100
West Palm Beach, Florida 33401
(407) 835-9600

8588A
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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INTEREST OF AMICUS CURIAE

The Tax Section of The Florida Bar is filing this brief, as Amicus Curiae, in support of the position of the Respondent-Estate of O.C. Hubert and asks this Court to affirm the decisions below of the Eleventh Circuit Court of Appeals and the United States Tax Court.[1] Due to the large number of probate administrations opened in Florida each year this case will have great impact on Florida residents as well as professionals involved in the administration of estates and trusts. The case will also have an impact on charitable organizations who are dependent on private funding.

SUMMARY OF THE ARGUMENT

This case involves whether the marital and charitable deductions reported by the Respondent Estate should be reduced by the amount of administration expenses charged to income and deducted on the Estate's federal income tax returns. It is the position of the Amicus that no downward adjustment to either the marital or charitable deduction should occur since the economic interests of such beneficiaries were not adversely affected during the period of estate administration. The government's position is that the marital and charitable deductions should be automatically reduced or "set-off" by the amount of all expenses borne by the marital or charitable beneficiaries even though fiduciary accounting income exceeded expense by nearly $3.5 million over the first five years of administration.[2]

The government's position suffers from several defects. First, it effectively adds, without adequate support from the

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1. Counsel for both Petitioner, Commissioner of Internal Revenue, as well as Respondent, Estate of O.C. Hubert, consented to the filing of this brief as an Amicus Curiae. Rule 37.2(a), S. Ct. R. Prac. & Proc.

2. *See* discussion in note 35, *infra*.

relevant statutory provisions of the estate tax and its underlying legislative history, a second valuation date for federal estate tax purposes. The valuation date is generally the date of death and is used in valuing the gross estate. A second deemed valuation date is imputed by the government solely for the purpose of determining (reducing) the marital and charitable deduction. Such date may be characterized as the "charge-off" or "set-off" valuation date, *i.e.*, date of death value less allocable administration costs incurred during the the entire period of the estate administration.

Since post-mortem income allocable to marital and charitable beneficiaries is ignored by the Petitioner, the second valuation date can only result in a reduction of the applicable marital or charitable deduction. Therefore, where allocable administration expenses are deducted for federal income tax purposes instead of on the estate tax return, an increase in federal estate tax always results, even where the estate is to be distributed to a single marital or charitable beneficiary.

Based on the nature of an estate administration, the amount ultimately received by a beneficiary on date of distribution will rarely equal the finally determined estate tax value of the assets. This is because realized (as well as unrealized) income and expense during administration must be allocated among the estate's beneficiaries in conformity with state law. The Tax Court and Eleventh Circuit Court of Appeals recognized the fundamental distinction between date of death values used for federal estate tax purposes and values on dates of distribution used for probate purposes. The Tax Court referred to this as the difference between the amount of the "marital deduction", deductible under 26 U.S.C. § 2056, and the amount of the "marital share" or "marital portion", the amount ultimately received by the marital beneficiary after the estate administration is completed. The government's position, by failing to give substance to this distinction, contravenes the basic

structure of the prescribed method for computing the taxable estate.

A second defect in the government's position is that it ignores the language set forth in 26 U.S.C. § 2056(b)(4)(B) that the reduction in value of a marital bequest for an encumbrance or liability must be determined in accordance with gift tax valuation principles. For gift tax purposes, post-transfer expenses incurred by a donee do not reduce the value of the gift. Only where there is a "material limitation" on the right to receive the income from the property used to fund a marital or charitable bequest is a downward valuation adjustment required.

During the relevant period of the estate administration, fiduciary accounting income exceeded expense by nearly $3.5 million, which net income was allocated to the marital and charitable beneficiaries. A substantial portion of the administration expenses charged to income were incurred in operating and maintaining commercial real estate owned by the Estate. Rents generated from the properties paid such expenses. This resulted in a matching of income with expense for fiduciary accounting purposes. Furthermore, a substantial portion of the remaining administration expenses, *e.g.*, legal fees, court costs, etc., primarily benefitted the beneficiaries of the estate. Nevertheless, despite the matching of period revenues with costs, and resulting income and benefits derived by the beneficiaries, the government claims that the value of what each received for federal estate tax purposes should be reduced by administration expenses charged to income. In contradistinction, the only clear indication in the estate tax regulations of when a reduction from gross to net value should occur is where all income is necessarily charged for the payment of administration expenses. 26 C.F.R. § 20.2056(b)-4(a).

Third, Petitioner's argument effectively repeals 26 U.S.C. § 642(g), which permits an executor to deduct each item of

administration expense for federal income tax purposes instead of for federal estate tax purposes. Many estates, such as the one in this case, are planned in advance to avoid federal estate tax through use of the unlimited marital deduction and/or charitable deduction. In such instances, deducting administration expenses from the gross estate will have little, if any, benefit in reducing federal estate taxes. Tax benefit is received by deducting such expenses in computing the estate's taxable income. This is the purpose inherent in the 26 U.S.C. § 642(g) election. Yet, according to the Petitioner's reasoning, an executor's failure to claim what is otherwise a "wasted" estate tax deduction in order to reduce federal income taxes ironically triggers a greater estate tax cost than the income taxes saved. The government's argument turns the intended benefit of 26 U.S.C. § 642(g) upside-down.

Finally, the government's argument suffers from a conceptual weakness when it infers that had the administration expenses been deducted for federal estate tax purposes, no federal estate tax deficiency would have resulted. By increasing income taxes to save estate taxes, *i.e.*, by being forced to deduct administration expenses on the estate tax return, the same marital and charitable beneficiaries will also be charged with the payment of such expense. Through the Commissioner's own reasoning there will also be a reduction to net value for the increase in federal income taxes, which charge is non-deductible for both income and estate tax purposes. Based on the Petitioner's circular analysis, an estate tax will always be imposed even where the sole beneficiaries of an estate are a spouse and/or qualified charity as is present in this case. An absurd result such as this could not have been intended by Congress. Amicus contends that there is nothing in the statutory language, legislative history, or regulations to 26 U.S.C. § 2056(b)(4)(B) which support's the government's "automatic" or "set-off" reduction rule for administration expenses charged to income.

In an effort to aid this Court in evaluating this complex question, Amicus asks that this Court consider the following solution:

1. An administration expense claimed as a deduction for federal estate tax purposes which is borne by a marital or charitable beneficiary reduces the estate tax marital or charitable deduction by an equal amount. 26 U.S.C. § 2056(b)(4)(B);

2. An administration expense which, per 26 U.S.C. § 642(g), is deducted for federal income tax purposes and is borne by a marital or charitable beneficiary does not reduce the marital or charitable deduction for federal estate tax purposes unless the extent of all of such charges materially limits the right of the beneficiary to enjoy such property. Whether there is a material limitation must be determined by all facts and circumstances, including whether allocable income exceeded expense, the distribution of income during administration, whether the beneficiaries directly benefited from the subject expenses, etc.;[3] and

3. As to marital deduction trusts which impose a qualifying income interest requirement, no reduction to the marital deduction results merely by discretion granted to the executor or trustee to charge receipts and expenses between income and principal provided the exercise of such discretion is subject to court review.

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3. The courts have consistently held that where administration expenses are charged to principal under state law, a reduction in the "net value" of the amount passing to the marital beneficiary or to charity always results. *See Ballantine v. Tomlinson*, 293 F.2d 311 (5th Cir. 1961); *Estate of Roney v. Commissioner*, 294 F.2d 774 (1961), *aff'g per curium*, 33 T.C. 801 (1960). Although this result is correct where the recipient of income does not have the same identity of the recipient of principal, the result should be otherwise where such identity in interest is present, *e.g.* specific bequest of property or similar outright gift to spouse or to charity.

ARGUMENT

I. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH FUNDAMENTAL PRINCIPLES OF VALUATION USED FOR FEDERAL TRANSFER TAX PURPOSES

A. Basic Structure of Federal Estate Tax

The federal estate tax is imposed on a decedent's taxable estate based on the value of property and interests in property passing by reason of a decedent's death. 26 U.S.C. § 2051. The first step in determining the taxable estate is to compute the value of the gross estate. 26 U.S.C., Part III (§§ 2031-2046). The gross estate includes the value of all property comprising the decedent's probate estate, as well as property passing outside of probate with respect to which the decedent has retained certain rights or interests.[4]

From the value of the gross estate, deductions are allowed in arriving at the taxable estate. 26 U.S.C. Part IV, §§ 2052-2056A. Permitted deductions include claims against the estate, expenses of administration, and casualty-type losses unreimbursed by insurance or otherwise occurring during the estate administration. The value of property passing from the decedent to a surviving spouse or to a qualified public charity, is also deductible from the value of the gross estate. 26 U.S.C. §§ 2056 (marital deduction) and 2055 (charitable deduction).[5]

4. 26 U.S.C. § 2031.

5. Once the taxable estate is determined, the next step is to compute the tentative tax by adding the value of adjusted taxable gifts made during the decedent's lifetime to the taxable estate. 26 U.S.C. § 2001(b). The final computation is to reduce the tentative tax for gift tax paid and other credits in arriving at the estate tax amount. 26 U.S.C. §§ 2001(b); Part II, §§ 2010-2016.

B. Value of Gross Estate/Fair Market Value

For federal estate tax purposes, property is valued at its "fair market value" as of the applicable valuation date, *i.e.*, date of death. 26 U.S.C. § 2031.[6] Fair market value is the price derived from a hypothetical sale of the subject property between a willing seller and willing buyer, each having reasonable knowledge of all relevant facts and neither under any compulsion to sell or buy.[7] As the product of a hypothetical sale, fair market value is determined without regard to facts or occurrences concerning the particular estate, *i.e.*, identifying the specific property subject to probate, the projected or actual date of distribution or funding, etc.[8]

Accordingly, the fair market value of property for federal estate tax purposes is not reduced by charges or costs to which

6. 26 U.S.C. § 2031. 26 U.S.C. § 2032 permits the executor to elect to value the gross estate on the date which is six months after the date of death provided the aggregate value of the gross estate and sum of the estate and generation skipping transfer taxes imposed on the estate are both lower than the corresponding values and taxes computed as of the date of death. Even where alternate valuation is elected, only assets includible in the gross estate are subject to federal estate tax. 26 C.F.R. § 20.2032-1(d).

7. 26 C.F.R. § 20.2031-1(b).

8. The Tax Court in this case, as well as in a prior decision, rejected efforts by the Internal Revenue Service to discount to its present value the fair market value (at date of death) of property passing under a marital bequest for the intervening period of estate administration prior to the date of funding. *See Estate of Hubert*, 101 T.C. 314, 332-333, *Estate of Friedberg v. Commissioner*, T.C. Memo 1992-310. Ironically, Judge Halpern, who wrote one of the two dissenting opinions in the fully reviewed decision of the Tax Court in this case, issued the Memorandum Opinion in *Estate of Friedberg*. Amicus submits that the reasoning used by Judge Halpern in the earlier case appears to be at odds with his analysis in *Estate of Hubert*, especially in light of the economic facts in this case. *See* note 35, *infra*.

such property may later become subject.[9] Similarly, while fair market value takes into account the income producing potential of an asset on date of death, the right to receive income accrued and earned after the date of death is not includible in the gross estate.[10] This basic principle of estate tax valuation was

9. The Petitioner's view, as set forth it its brief, is to the contrary. Petitioner asserts that the value of an asset for federal estate tax purposes is like a "bundle of rights", with one of such "rights" consisting of the future income stream to be produced by such asset. Where income or corpus of a marital or charitable bequest is charged with the payment of estate expenses, Petitioner asserts that the value passing to the recipient, and therefore the marital or charitable deduction, is reduced. Petitioner's Brief, p. 16. Amicus contends that such position directly conflicts with the computation of fair market value for federal estate tax purposes. The Petitioner's "bundle of sticks" metaphor clearly suffers from a defect in consistency. By acknowledging that charges to the stream of post-mortem income "stick" reduces the value of the "bundle of rights", the government does not allow for an increase in value, for purposes of 26 U.S.C. §§ 2056 (marital deduction) or 2055 (charitable deduction) for post-mortem net income distributed to qualifying beneficiaries. In this case, post-mortem income less administration expenses (regardless of whether charged to principal or income) for the relevant five year period (1986-1991) was approximately $2 million. Petitioner's Brief, P. 8. Such income is distributable to the marital trusts and charitable beneficiary. Neither the Respondent has asserted nor does existing precedent allow for an increase in the marital or charitable deductions for allocable post-mortem net income and appreciation. The Petitioner's position can be characterized as a "heads I win, tails you lose" approach. On the one hand, if administration expenses are charged to income, estate taxes increase, regardless of whether post-mortem income fully absorbs such charges. On other hand, the marital or charitable deduction is not increased where allocable net probate income increases the actual or real value received.

10. *Alston v. Commissioner*, 349 F. 2d 87, 88 (5th Cir. 1965); *Waldrop v. United States*, 137 F. Supp. 753, 756 (Ct. Cl. 1956). *Compare Sharp v. Commissioner*, 19 F. 2d 802 (3rd Cir. 1937), *modifying* 30 BTA 532 (1934), *rev'd on another point*, 303 U.S. 624 (1938) (dividends on stock where record date after date of death not includible in gross estate); *Mandel v. Sturr*, 266 F.2d 321 (2nd Cir. 1959), *rev'g* (1957, D.C.N.Y.) 52 AFTR 1585(interest payable (Cont'd)

acknowledged by the holding of this Court. *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed 1421 (1935).[11] The same valuation principles are used in establishing the value of a taxable gift.[12]

C. Estate Tax Marital Deduction

An estate tax marital deduction is allowed under 26 U.S.C. § 2056 for the value of any interest in property includible in the gross estate which either passes at death, or, has passed during the life of the decedent, to a surviving spouse.[13] Again, the value of property passing to a surviving spouse is its fair market value used in valuing the gross estate.

Where assets used to fund a marital deduction bequest either appreciate in value or are allocated income during the

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to estate on capital account of decedent's partnership interest accruing after date of death not includible in gross estate); Revenue Ruling 65-217, 1965-2 C.B. 214 (bonuses awarded to decedent after death not includible in gross estate) *with* 26 C.F.R. § 20.2031-3 (future earnings capacity relevant factor in valuing interest in closely held business); Revenue Ruling 68-609, 1968-2 C.B. 327 (valuation of stock in close corporation).

11. *Rev'g* 6 F. Supp. 141 (Ct. Cl. 1934)(post-mortem income from decedent's interest in partnership not includible in gross estate; allocable to income not corpus in accordance with state law). Only income accrued as of the date of death is includible in the gross estate. 26 U.S.C. § 691.

12. 26 U.S.C. §§ 2511, 2512. 26 C.F.R. §§ 25.2512-1, 25.2512-3. 26 U.S.C. § 2624. Special gift tax valuation rules under Chapter 14 of the Code, deviate from the general willing-seller, willing-buyer standard for gifts of certain retained interests in controlled entities or trusts. 26 U.S.C. §§ 2701-2702, 2704(a).

13. Donative transfers to a spouse during the decedent's lifetime qualify for the gift tax marital deduction. 26 U.S.C. § 2523.

administration period, no additional deduction results for the increased value passing to the marital beneficiary.[14] There also is no corresponding increase to the gross estate with respect to post-mortem income or appreciation. In similar fashion, no reduction to the marital deduction is made where the subject property declines in value between date of death and date of funding.[15] Unless the marital bequest takes the form of a (pre-residuary clause) pecuniary bequest, the value of property actually received by the marital beneficiary will always vary from the amount of the marital deduction.

There are several permitted methods of transfer which qualify for the estate tax marital deduction. Each method shares the same fundamental characteristic; the interest passing to a surviving spouse must be one which, when later transferred by the surviving spouse during his or her lifetime or at death, will result in gift or estate tax. 26 C.F.R. § 20.2056(a)-2(a). From an

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14. *Florida Bank at Lakeland v. United States*, 443 F.2d 467 (5th Cir. 1971). *See* Revenue Procedure 64-19, 1964 (Pt.1) C.B. 682. The Tax Court recognized as critical the distinction between the value of property ultimately received by a marital beneficiary (the "marital share" or "marital portion") from the value of property "passing to a surviving spouse" under 26 U.S.C. § 2056 (the "marital deduction"). The latter phrase does not reflect allocable appreciation and earnings during the period of administration. *Estate of Hubert v. Commissioner*, 101 T.C. 314, 315, fn. 1.

15. A fractional share marital deduction formula, *e.g.* percentage of residuary estate, requires that the marital beneficiary proportionately share in interim appreciation or depreciation through the date of distribution. *See* 26 C.F.R. § 20.2056(b)-5(a)(surviving spouse's interest reflects its proportionate share of the increase or decrease in the value of the entire property interest). Where the marital deduction is funded by a pecuniary bequest, however, appreciation or depreciation in asset values during the estate administration but prior to funding is borne by the non-marital beneficiaries. *But see* Revenue Procedure 64-19, *supra*, note 21 (guidelines restricting use of satisfying pecuniary bequests with estate tax values).

economic perspective, the estate tax marital deduction is simply a deferral in estate tax until a disposition is subsequently made by the surviving spouse.[16]

Two statutory rules reduce the marital deduction from the date of death value of assets used to fund the transfer. First,death taxes charged to property passing to a surviving spouse, 26 U.S.C. § 2056(b)(4)(A) reduce the marital deduction by such amount. This rule, which has a direct counterpart for the estate tax charitable deduction, 26 U.S.C. § 2055(c), ensures the

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16. *See United States v, Stapf*, 375 U.S. 118, 128 (1963). In the *Stapf* case, a wife elected to waive her one-half share in community property of her deceased husband's estate in order to benefit as a beneficiary under his will. The value of her right in the couple's community property she relinquished exceeded the value she received under the will. The effect of the waiver was a gift to the couple's children. In rejecting the estate's position that a marital deduction should be granted for the value of property received by the wife under the will, this Court held that the value of the assets passing to the wife must be reduced by the value of what she relinquished in the community property. Since the property bequeathed to the surviving spouse exceeded in value the property she relinquished, the widow received no "net benefit". Therefore, the marital deduction was denied. The holding in *Stapf* is presently embodied in 26 C.F.R. § 20.2056(b)-4(b), Example (3).

The *Stapf* case has frequently been cited by the Petitioner, Commissioner of the Internal Revenue Service, in direct support of its position in this case. Petitioner's Brief, passim. Amicus submits that the Petitioner's reliance on dictum from the *Stapf* case, is misplaced. This Court's decision in *Stapf* is not controlling of the issue before this Court since the *Stapf* case depends on the presence of community property as a predicate for its analysis. As such, were a court to have granted the taxpayer in *Stapf* a marital deduction, the rules applicable to the federal estate taxation of community property would have been subverted. This is because Mr. Stapf's gross estate only included one-half of the value of the community assets. Under the facts in the case, allowing any marital deduction would have, in effect, improperly granted a double deduction. *See* S. Rep. No. 1013, 80th Cong., 2d Sess. (1948), reprinted in 1948-1 C.B. 285, 304-305.

integrity of the marital deduction by imposing the death tax burden on non-marital assets.[17]

The second statutory rule, the proper application of which is in issue before this Court, is contained in 26 U.S.C. § 2056(b)(4)(B). This rule provides that where property passing to a surviving spouse is encumbered, only the "net value" of the property, *i.e.*, gross value less encumbrances, qualifies for the marital deduction. The method used in making this adjustment, as set forth in 26 U.S.C. § 2056(b)(4)(B), is that used for valuing a gift of encumbered property to a spouse for federal gift tax purposes.

> (B)where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, *such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.* [Emphasis added]

When 26 U.S.C. § 2056(b)(4)(B) was enacted in the Revenue Act of 1948,[18] the Board of Tax Appeals had held that a

17. Since the applicable charge for death tax reduces the marital deduction which in turn increases the tax, the computation is interrelated. *See* Revenue Ruling 77-345, 1977-2 C.B. 337. The same "tax-on-tax" effect is present under the government's position concerning charging administration expenses to income (or principal) of a marital or charitable beneficiary. Unlike encumbrances and liabilities described in 26 U.S.C. § 2056(b)(4)(B), death taxes, including federal estate taxes, are never deductible in computing the taxable estate. *See* 26 U.S.C. §§ 2011 (credit for state death taxes), 2012 (credit for gift tax), and 2013 (credit for prior transfers).

18. P.L. 471, 80th Cong., 2nd Sess., Ch. 168; § 361, 62 Stat. 177.

gift of mortgaged property must be reduced by the amount of the outstanding liability on date of transfer. *D.S. Jackman v. Commissioner,* 44 BTA 704 (1941), acq. 1942-1 C.B. 9.[19] Presumably, this is the "net value" result that Congress intended for the estate tax marital deduction.[20] Indeed, an example using mortgaged property was specifically recited in the Senate Report.[21]

Amicus views Congress' primary aim in enacting the net

19. Where the donor remains personally liable for repayment of the debt, the value of the gift may not be reduced by the mortgage. *See Commissioner v. Proctor*, 142 F.2d 824 (4th Cir. 1944), *cert. denied*, 323 U.S. 756 (1944). *See* Stephens, Maxfield, Lind & Calfee, *Federal Estate and Gift Taxation*, Warren, Gorham & Lamont, 6th Ed. (1991), p.10-42 to 10-43.

20. S. Rep. No. 1013, 80th Cong. 2d Sess. (1948), reprinted in 1948-1 C.B. 285. The legislative history reveals that Congress was aware of the holding in *Jackman, supra,* and the analysis set forth in the *Proctor* case by stating that the reduction for the mortgage amount applies with respect to a marital bequest of property subject to a mortgage regardless of whether the decedent was personally liable. Amicus is unaware of any subsequent reported gift tax decision after the Revenue Act of 1948 that is inconsistent with this principle.

21. *Ibid*, p. 335. "If the decedent by his will leaves to his surviving spouse real estate subject to a mortgage (whether or not such mortgage was a personal liability of the decedent), the value of the interest passing to the surviving spouse does not under this section include the mortgage. If, however, the decedent by his will directs the executor to pay off the mortgage, such payment constitutes an additional interest passing to the surviving spouse. If the decedent bequeaths certain property to his surviving spouse subject, however, to her agreement, or a charge on the property, for payment of $1,000 to X, the value of the bequest (and, accordingly, the value of the interest passing to the surviving spouse) is the value, reduced by $1,000 of such property."

value rule in 26 U.S.C. § 2056(b)(4)(B) was to prevent an estate from effectively claiming a double deduction for federal estate tax purposes. First, by deducting the liability as a claim against the decedent, per 26 U.S.C. § 2053, and then in claiming the gross estate value of the asset for marital deduction purposes. For example, suppose H dies owning Blackacre having a fair market value on date of death of $1,000x which is then subject to a mortgage of $500x. In his will H bequeaths Blackacre, subject to the mortgage, to W outright. Without 26 U.S.C. § 2056(b)(4)(B), H's estate would be permitted to claim a marital deduction of $1,000x even though it is also permitted a deduction of $500x under 26 U.S.C. § 2053. In order to prevent a double estate tax deduction, 26 U.S.C. § 2056(b)(4)(B) requires the marital deduction be reduced to reflect W's equity in Blackacre or $500x.

Insight as to the scope and application of 26 U.S.C. § 2056(b)(4)(B) is found in the legislative history of the provision, not only from what is recited, but by giving substance to what was left unstated. The only example used in the Senate Report to explain this provision was an outright bequest to a spouse of property subject to a mortgage.[22] The Senate Report instructs that under 26 U.S.C. § 2056(b)(4)(B), only the unpaid balance of the mortgage is reduced from the value of the property transferred. The Senate Report is silent on whether further reduction should result for post-transfer mortgage payments or expenses. For gift tax purposes no reduction occurs. Therefore, Amicus contends that such omission was purposeful and is consistent with the view that post-mortem charges for administration expenses charged to income do not automatically reduce the net value passing to a marital beneficiary.

Returning to the preceding example, assume that post-death property taxes of $50x and maintenance costs of $50x were paid

22. Note 21, *supra*.

by the executor prior to distribution of Blackacre to W. Based on the legislative history of 26 U.S.C. § 2056(b)(4)(B), there is no additional adjustment of $100x for the post-mortem payments. The same result would apply had Blackacre instead, for example, passed to W through an inter vivos trust after the expiration of H's retained interest for life in income,[23] or by reason of W's survivorship were Blackacre held as tenancy by the entireties.[24]

The Treasury issued regulations under 26 U.S.C. § 2056(b)(4)(B) in 1958.[25] In particular, 26 C.F.R. § 20.2056(b)-4(a) states, in relevant part:

> Marital deduction; valuation of interest passing to surviving spouse.—(a) In general. * * * The marital deduction may be taken only with respect to the net value of any deductible interest which has passed from the decedent to his surviving spouse, the same

23. A frequently used method for transferring property to a spouse is a revocable trust which is includible in the decedent-settlor's gross estate but not subject to probate. The surviving spouse's interest is not subject to estate tax under the (unlimited) estate tax marital deduction. The allocation of administration expenses under the (Revised) Uniform Principal and Income Act ("RUPIA") differs between estates and trusts. For estates, unless the will otherwise provides, administration expenses are charged to principal. RUPIA § 5(a). However, for trusts, including revocable trusts, many trust administration expenses are charged to income unless the trust otherwise provides. RUPIA § 13(a). Thus, for revocable marital deduction trusts, a trust must contain specific language ordering all administration expenses be charged to corpus to avoid the adverse result that the government seeks to impose in this case.

24. Although in this case, the inclusion of Blackacre in the gross estate may only have been for one-half of the gross value or $500x. *See* 26 U.S.C. § 2040(b).

25. T.D. 6296, 6/23/58.

> principles being applicable as if the amount of a gift were being determined. *In determining the value of the interest in property passing to the spouse account must be taken of the effect of any material limitations upon her right to income from the property.* An example of a case in which the rule may be applied is a bequest of property in trust for the benefit of the decedent's spouse but the income from the property from the date of the decedent's death until distribution of the property to the trustee is to be used to pay expenses incurred in the administration of the estate. [Emphasis added].

This regulation recognizes that the funding date of a marital bequest invariably will be postponed where assets used to fund such bequest are part of the probate estate. During the period of estate administration, income and expense will generally be allocable to marital property based on the decedent's will and applicable state law. The same economic adjustments for fiduciary accounting income are made with respect to marital deductions trusts which pass outside of probate. In Revenue Ruling 69-56, 1969-1 C.B. 224, the Service accepted that a trustee's right to charge income or principal for trust expenses was not a material limitation on a marital beneficiary's right to receive trust income and did not result in a disallowance or diminution of the marital deduction.

Liabilities of the decedent existing at death are deductible as claims under 26 U.S.C. § 2053.[26] Where marital property bears the economic burden of a claim, gross value is reduced to net

26. Unlike administration expenses which the executor may elect to deduct for federal income taxes instead of estate taxes, claims are only deductible for federal estate tax purposes.

value for marital deduction purposes.[27] This result, mandated by 26 U.S.C. § 2056(b)(4)(B), again forecloses a double deduction.[28] In a gift tax context, the outstanding claim would reduce the value of property transferred in the same manner.[29] The application of fiduciary accounting rules is consistent with this result as a claim will invariably be charged against principal since it is outstanding (choate or inchoate) at the moment of death (or gift).[30]

27. *See, e.g. Alexander v. United States*, 640 F.2d 1250 (Ct. Cl. 1981). The government previously attempted (only to later retreat) to stretch the application of 26 U.S.C. § 2056(b)(4)(B) to an illogical extreme with respect to contingent liabilities and the marital deduction. *Compare* PLR 9113009 (Dec. 21, 1990) *with* PLR 9409093 (Dec. 1, 1993). August, *IRS Reverses Prior Ruling on the Impact of Guarantees of the Marital Deduction*, 80 J. Tax'n 324 (June 1, 1994).

28. *Estate of Hubert v. Commissioner*, 101 T.C. 314, 323 (1993). *Estate of Street*, 974 F. 2d 723 (6th Cir. 1992), *aff'g in part*, T.C. Memo 1988-553; *Burke v. United States*, 994 F. 2d 1576 (Fed. Cir.), *cert. denied*, 114 S. Ct. 546 (1993), *Fisher v. United States*, 28 Fed. Cl. 88, 93 (1993).

29. A similar economic (and tax) result follows from a "net gift", *i.e.*, where the donee agrees in advance to pay the donor's gift tax liability on the property transferred. Revenue Ruling 75-72, 1975-1 C.B. 310; *Turner v. Commissioner*, 49 T.C. 356 (1968), non-acq. 1971-1 C.B. 3, *aff'd per curiam*, 410 F.2d 752 (6th Cir. 1969). *Cf. Diedrich v. Commissioner*, 457 U.S. 191, 102 S. Ct. 2414, 72 L. Ed. 2d 777 (1982).

30. RUPIA § 5(a). A decedent may direct by will however to charge claims to income. Administration expenses are charged to principal unless the will permits the executor to charge income. This provision was contained in Mr. Hubert's will. *Estate of Hubert v. Commissioner*, 101 T.C. 314, 316. Ga. Code Ann. §§ 53-2-101, 53-15-3. *Estate of Warren v. Commissioner*, 981 F.2d 776 (5th Cir. 1993) (allocation of administrative expenses did not reduce charitable deduction). The fiduciary must exercise the right to charge expenses and claims between income and principal in a "reasonable and equitable" manner. RUPIA 3(a)(3). Ga. Code Ann. § 53-12-212(a)(3). *In re Colyear's Estate*, 94 Cal. Rptr. 696, 17 C.A. 3d 173 (1971); *Jennings v. Speaker*, 571 P.2d 358, 1 Kan. App. 610 (1977); *In re Holloway's Will*, 323 N.Y.S. 2d 534 (1971).

The analysis by which claims of the decedent reduce the marital (and charitable) deduction is materially different than that used with regard to estate administration expenses.[31] As noted in this case by the Eleventh Circuit and Tax Court below, administration expenses evolve after the date of death, both as to liability and amount. The estate tax regulations note this fundamental distinction.[32] As further evidence of this fundamental difference, Congress allows executors the flexibility of deducting administration expenses from the gross estate, or, alternatively, from gross income in reducing taxable income for federal income tax purposes. 26 U.S.C. § 642(g).[33] The purpose of § 642(g) is to deny an estate both an income tax deduction and an estate tax deduction for the same economic

31. We note that several courts have refused to make this concession. *Estate of Burke v. United States*, 994 F. 2d 1576 (Fed. Cir.), *cert. denied*, 114 S. Ct. 546 (1993); *Fisher v. United States*, 28 Fed. Cl. 88, 93 (1993); *Estate of Street v. Commissioner, supra*, 974 F. 2d 723 (6th Cir. 1992), *aff'g in part*, T.C. Memo 1988-553.

32. *Compare* 26 C.F.R. § 20.2053-4 (amounts deducted as claims are "such only as represent personal obligations of the decedent existing at the time of his death, whether or not then matured, and interest thereon which had accrued at the time of death) with 26 C.F.R. §§ 20.2053-3(a)("administration expenses" . . . limited to those which are "actually and necessarily incurred in the administration of the decedent's estate"), 20.2053-1(a)(3)(vague or uncertain estimates of administration expenses not deductible until amount of liability is ascertained).

33. 26 U.S.C. § 642(g) only has applicability with respect to administration expenses or losses. It does not apply to either the marital or charitable deduction. Since marital transfers (other than alimony payments described in 26 U.S.C. §§ 71 and 215) are not deductible for federal income tax purposes while an estate (or trust) is not permitted a charitable deduction for income tax purposes for testamentary transfers to charity. Only amounts generated from subsequent receipts of post-mortem income or principal qualify for a charitable deduction for federal income tax purposes to an estate or trust. 26 U.S.C. § 642(c).

outlay. Unlike administration expenses, claims against an estate are outside of 26 U.S.C. § 642(g) and may only be deducted for federal estate tax purposes.

Under the facts in this case, the decedent's will granted the executor, as provided under applicable state (Georgia) law, the discretion of charging estate administration expenses "against income or principal or apportion the same".[34] During the applicable five year period, the estate received income of $5.44 million and incurred administration expenses of $2.5 million.[35]

34. *Estate of Hubert v. Commissioner*, 101 T.C. 314, 316. Ga. Ann. Code §§ 53-2-101, 53-15-3 (Michie 1982).

35. Amicus notes that the record is unclear as to the exact amount of income and expense incurred during the administration of the estate from the date of death, June 2, 1986, through September 26, 1991. The income tax returns reveal that for such period, aggregate gross income (reduced by capital gains of approximately $1.1 million which are generally allocable to corpus) was $4.14 million while aggregate administration expense was $1.14 million. Jt. Ex. 2-B, 3-C, 4-D and 5-E respectively. Net fiduciary accounting income was therefore $3 million. In addition, the federal estate tax return reported approximately $.5 million in deductions for administration expenses. This results in approximately $2.5 million of net income over total administration expenses during the first four years of administration. Judge Beghe's dissenting opinion in the Tax Court states that for the first five and one-half years of administration, *i.e.*, through September 26, 1991, income was "no less than $4.5 million" and total administration expenses were $2 million. 101 T.C. 314, 348. It is not clear how Judge Beghe arrived at his income calculation. Judge Beghe's expense calculation through September 26, 1991 apparently is based on expense information provided by the executor. Jt. Ex. 33A.G. The government's brief uses Judge Beghe's calculation. Pet. Brief, p.8.

Based on this discrepancy in information, Amicus projected one and one-third additional years of income (excluding capital gains) to the Estate for the period June 1, 1990 to May 31, 1991 based on the average of the preceding four years' income or $1.3 million. Thus, Amicus assumes that fiduciary

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The executor charged approximately one-fourth of such expenses or $.5 million to principal and claimed an estate tax deduction for such amount under 26 U.S.C. § 2053. The executor reduced the "net value" of the marital and charitable deduction by the same amount. The balance of the administration expense of $2 million were deducted for federal income tax purposes and charged to income. 26 U.S.C. §§ 642(g), 212. The Petitioner's position is that the value of the marital and charitable deductions must be reduced by the administration expenses charged to income which were deducted for federal income tax purposes.[36] This further results in an additional deficiency for the tax-on-tax effect since the same marital trusts and charity bear the burden of the estate tax assessment. 26 U.S.C. §§ 2056(b)(4)(A), 2055(c).

Where administration expenses are deducted for federal income tax purposes, generally the personal representative (or trustee of a trust includible in the gross estate) will charge the expense to income. This avoids a potential dispute among beneficiaries since to charge principal would unfairly benefit income, *i.e.*, the income beneficiary's federal income tax burden is reduced while the charge is economically borne by

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accounting income from June 2, 1986 through September 26, 1991 was $5.44 million while total administration expenses through September 26, 1991 were $2.5 million. Approximately $2 million of the administration expenses were charged to income and deducted on the estate's federal income tax return. The balance or approximately $.5 million, was charged to principal and deducted on the estate tax return. Jt. Ex. 1-A. Therefore, Amicus assumes that net fiduciary accounting income for the relevant five (and one-third) year period was approximately $3.44 million.

36. Furthermore, since the subject administration expenses before the Tax Court only covered the 1986-1991 period of administration, the total adjustment sought by the government would have to be increased by expenses charged to income from 1992 (to the present) and additional estate taxes computed on such amount.

principal.[37] Nevertheless, under the government's approach, even though income is properly charged for expenses used to reduce the income beneficiary's federal income tax liability, federal estate taxes are still increased by virtue of the foregone estate tax deduction. This cost will be charged to principal. Therefore, the government's position, if adopted by this Court, increases the potential for beneficiary conflict and fiduciary liability arising from the revised interdependent sequence and consequence resulting where administration expenses are charged to income.

D. Impact of Charging Administration Expenses to Income of Marital Deduction Trusts

The two marital deduction trusts involved in this case each separate the interest of the marital beneficiary, *i.e.*, income interest (to Mrs. Hubert) for life, from that of the remaindermen (children of the decedent). In an effort to qualify each trust for the marital deduction, the decedent's will, as revised by the settlement, designed one trust to qualify under in 26 U.S.C. § 2056(b)(5)(life estate, general power of appointment or "LE/PA" trust), and the other under 26 U.S.C. § 2056(b)(7) (qualified terminable interest trust or "QTIP" trust).[38]Therefore, Mrs.

37. In *Matter of Warms*, 140 N.Y.S. 2d 169 (Surr. Ct. NY Co 1955)(income beneficiary required to reimburse remaindermen for increased federal estate taxes as a result of estate's claiming income tax deductions for expenses charged to principal); *Estate of Bixby*, 140 Cal. App.2d 326, 295 P.2d 68 (1956). *See* Blattmachr, *The Tax Effects of Equitable Adjustments: An Internal Revenue Code Odyssey*, 18 U. Miami Inst. on Est. Plan., Ch. 14 (1984); Carrico & Bondurent, *Equitable Adjustments: A Survey and Analysis of Precedents and Practice*, 63 Tax Law 545 (1983).

38. The two important differences of a QTIP trust from a LE/PA trust are that QTIP is elective and the income beneficiary spouse does not have to possess a qualifying general power of appointment over the trust's assets (or

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Hubert had to receive, inter alia, a qualifying income interest for life, *i.e.*, right to receive all income of each trust in annual or more frequent intervals for her lifetime. 26 U.S.C. §§ 2056(b)(5), 2056(b)(7)(B)(ii)(I). Accordingly, in addition to the "net value" concept of 26 U.S.C. § 2056(b)(4)(B), consideration must be given to whether there is a disqualification or diminution in the amount of the marital deduction where income of a LE/PA or QTIP trust is charged with payment of administration expenses.

The regulations to the qualified income interest of a LE/PA trust, which also apply to QTIP trusts, requires that the terms of the trust instrument, as well as applicable law, provide the surviving spouse with "substantially that degree of beneficial enjoyment of the trust property during her life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of the trust".[39] In other words, neither the trustee nor any third party may accumulate income or distribute income to a person other than the surviving spouse.[40]

The estate tax regulations specifically acknowledge the necessary application of state law in determining whether the qualifying income interest rule is met. In this regard, 26 U.S.C. § 20.2056(b)-5(f)(1) provides that the spouse of a marital deduction trust receives the requisite income interest as long as he or she receives "substantially that degree of beneficial

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qualifying portion thereof) during her lifetime and/or at death. Each type of trust overrides the normal rule which prohibits terminable interests, *e.g.* life estates, from qualifying for the marital deduction.

39. 26 C.F.R. §§ 20.2056(b)-5(f)(1), 20.2056(b)-7(d)(2). *See* Revenue Ruling 69-56, 1969- 1 C.B. 224; Revenue Ruling 85-35, 1985-1 C.B. 328.

40. 26 C.F.R. §§ 20.2056(b)-5(f)(4), -5(f)(5).

enjoyment...which the principles of the law of trusts . . . accord the life beneficiary". 26 C.F.R. § 25.2523(e)-1(f)(1)(same provision for gift tax purposes). The estate tax regulations, as well as corresponding provisions of the gift tax regulations, acknowledge that a trustee's discretionary powers to allocate receipts and expenses between income and principal will not adversely affect the qualification of a LE/PA or QTIP trust as long as the exercise of such powers is subject to reasonable limitations under local law.[41]

More specifically, 26 C.F.R. § 20.2056(b)-5(f)(9) states, in relevant part:

> An interest is not to be regarded as failing to satisfy the conditions . . . (that the spouse be entitled to all the income and that it be payable annually or more frequently) merely because the spouse is not entitled to the income from estate assets for the period before distribution of those assets by the executor, unless the executor is, by the decedent's will, authorized or directed to delay distribution beyond the period reasonably required for administration of the decedent's estate. As to the valuation of the property passing to the spouse in trust where the right to income is expressly postponed, see §20.2056(b)-4.

Under the facts of this case, the income beneficiary of the marital deduction trusts received distributions of income of approximately $2 million during the first five years of the

41. 26 C.F.R. §§ 20.2056(b)-5(f)(2), -5(f)(4) (estate tax), 25.2523(e)-1(f)(2) to -1(f)(4) (gift tax). *See* Revenue Ruling 69-56, 1969-1 C.B. 224.

administration.[42]There was also an additional $1.44 million in fiduciary accounting income realized by the estate during the same period which is allocable to the residuary estate, *i.e.*, the marital and charitable beneficiary. The marital beneficiary further directly benefitted from a substantial portion of the administration expenses which were incurred in connection with probate litigation affecting her interest in the estate. As such, the record does not reflect either a material limitation on the income beneficiary's enjoyment of income from the marital trusts or other impediment to satisfying the qualified income interest requirements.

E. Charitable Deduction

The value of property passing to qualified public charity is deductible for federal estate (and gift) tax purposes. 26 U.S.C. §§ 2055(estate), 2522(gift). As with 26 U.S.C. § 2056(b)(4)(A) pertaining to the marital deduction, 26 U.S.C. § 2055(c) provides that any estate or inheritance taxes borne by the charitable beneficiary reduces the value of the deduction. Although neither 26 U.S.C. § 2055 nor 26 U.S.C. § 2522 contains a provision corresponding with 26 U.S.C. § 2056(b)(4)(B), from a conceptual standpoint the same limitations should apply. Therefore, any claim or liability to which the property transferred to charity is subject on the date of the decedent's death should result in a corresponding reduction in the charitable deduction. Existing precedent also confirms that administration expenses charged to principal reduce the charitable deduction, even if such expenses are deducted for federal income tax purposes. Any further attempt, however, to analogize this area to the marital deduction, and, in particular marital deduction trusts, rests on a less stable foundation, due to the lack of symmetry

42. Jt. App., p. 51.

between marital deduction trusts and gifts to charity.[43]

The record in this case reveals that during the first four years of administration income amounts set aside to the charitable beneficiary were claimed as deductions on the returns of approximately $1.67 million. 26 U.S.C. § 642(c). Based upon information provided by Counsel for Respondent, the 1991 set aside amount to the charitable beneficiary was approximately $.264 million, resulting in a total of $1.934 million. Such set aside amounts, which will ultimately be distributed to the charity, were used to produce a 52% (to Mrs. Hubert) and a 48% (to the charity) allocation of fiduciary net income allocable to the residuary beneficiaries based on the settlement. Amicus submits that the record does not reveal any material limitation on the charitable beneficiary's right to income during the estate administration. Therefore no reduction to the charitable deduction should result for administration expenses charged to income.

II. THE PETITIONER'S POSITION IS IN DIRECT CONFLICT WITH CONGRESS' INTENT IN PERMITTING ESTATES TO CLAIM ADMINISTRATION EXPENSES EITHER FOR FEDERAL INCOME OR FEDERAL ESTATE TAX PURPOSES

The net effect of the government's position is to impose a

43. In this case, the gift to charity is outright and free of trust. Were the interest to be that of a future interest, *i.e.*, qualifying split-interest charitable remainder trust, a similar issue as to the estate tax impact in allowing the personal representative to charge expenses between income and principal would arise. By further analogy to marital deduction trusts, including the qualifying income interest rule for LE/PA and QTIP trusts, a charitable remainder benefiary's economic interest would be enhanced by charging administration expenses to income (non-charitable beneficiary). On the other hand, if the charity had a "lead interest" for a stated term, charges to income would reduce the charity's flow of funds.

federal estate tax on administration expenses in the amount of approximately $2 million. Such expenses were charged against income by the executor in a manner consistent with the decedent's will and state law. It was of tax benefit for the executor to elect to deduct such expenses on the estate's federal income tax return instead of on the estate tax return since to claim the deduction on the latter return would be of no tax benefit, *i.e.*, a wasted deduction.[44]

The Petitioner's view is that by charging administrative expenses to income, in order to claim a tax benefit for federal income tax purposes, the "net value" of property passing from the estate to the marital and charitable beneficiaries is reduced on a dollar-for-dollar basis. This valuation reduction increases federal estate tax, the payment of which is also directly borne by the same marital and charitable beneficiaries. 26 U.S.C. §§ 2056(b)(4)(A), 2055(c). After factoring in additional "tax-on-tax", plus statutory interest, the resulting deficiency in estate tax will exceed the total amount of administration expenditures charged to income.

Congress, in 1942, enacted 26 U.S.C. § 642(g) (formerly § 162(e)(1939 Code)) to prevent taxpayers from deducting investment type expenses for both income tax and estate tax purposes.[45] Congress left it up to the executor whether to claim

44. As originally reported by the Estate on its Federal estate tax form 706, the gross estate was valued at approximately $30 million while approximately $27 million was claimed as qualifying for either the marital or charitable deduction. The reported taxable estate (plus adjusted taxable gifts) was $1.5 million and the estate tax was assessed by the Estate to be $345,000 or slightly more than 1% of the gross estate. Therefore, the Estate, as reflected on the federal estate tax return, was essentially non-taxable for federal estate tax purposes.

45. The section was enacted at the same time that Congress granted individuals, estates, and trusts, the right to claim income tax deductions for (Cont'd)

each item of eligible deduction on either the estate or income tax return. Since executors are generally held accountable to the standard of attempting to lawfully minimize federal taxes, where there is otherwise little, if any, federal estate liability, as is the case here, deductions will be claimed for federal income tax purposes. In this case, the $2 million in claimed income tax deductions for administration expenses have the potential to reduce federal income taxes to the estate (or beneficiaries receiving distributions during the estate administration) by as much as $.8 million.[46]

The effect of the government's position is that in order to save $.8 million in federal income tax in accordance with 26 U.S.C. § 642(g), the Respondent estate must incur additional estate taxes approaching $2 million. This obviously is an illogical election for the executor to make and would easily subject it to liability yet this is exactly what the executor, a large trust company, in this case elected. Conversely, in order to save the additional estate taxes of $2 million, the government requires that all administration expenses be deducted on the estate tax return thereby increasing income taxes by $.8 million. Since marginal estate tax notes will generally exceed the marginal

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investment expenses. 26 U.S.C. § 212 (formerly § 23(a)(2)(1939 Code)). *See* Ferguson, Freeland and Ascher, *Federal Income Taxation of Estates, Trusts, and Beneficiaries*, Little, Brown and Company 1992, § 4.2.6. Prior to the 1942 legislation, deductions were allowable for both income and estate tax purposes. *Adams v. Commissioner*, 110 F.2d 578 (8th Cir. 1940).

46. Claiming the deduction in computing taxable income reduces the estate's distributable net income. When such expenses are charged to income, the charge reduces fiduciary accounting income which constitutes a ceiling amount of distributable net income. 26 U.S.C. §§ 643(a), 643(b), 652(a), 661(c). Estates and trusts are subject to the maximum marginal rate of federal income tax, presently 39.6%, once taxable income exceeds $7,500. 26 U.S.C. § 1(e). In contrast, individuals (unmarried) are not subject to the maximum marginal rate until taxable income reaches $.25 million.

income tax rates, the government's position reduces the "election" in 26 U.S.C. § 642(g) to a "no choice" decision to always claim administration expenses on the federal estate tax return.

Based on further extension of the government's own theory, where the burden of federal income taxes is borne by a marital or charitable beneficiary, which is increased by shifting a "usable" income tax deduction to a "wasted" estate tax deduction, such charge for increased federal income taxes also reduces the "net value" of the marital and charitable deduction. This results in the same increase to estate taxes, and "tax-on-tax" produced under the Commissioner's position where such expenses are charged to income. In other words, claiming administration expenses as deductions for estate tax purposes which is the lesson to be followed if the Commissioner's argument in this case is followed, will further reduce the marital or charitable deduction regardless of whether income or principal is charged. Amicus submits that while the government has not advanced this argument in this or presumably in any reported case, the conclusion necessarily follows from the circular nature of its reasoning.

Petitioner is asking this Court to effectively repeal 26 U.S.C. § 642(g) by converting an election into a non-election with respect to estates which are intended to be distributed primarily to marital or charitable beneficiaries. Amicus submits that such position lacks backing or support from the legislative history of 26 U.S.C. § 2056(b)(4)(B), the federal estate tax provisions governing marital and charitable deductions in general, or otherwise serves a valid tax policy objective.

Amicus submits that were this Court to adopt the government's position, executors will be forced to claim all administration expenses borne by marital or charitable

beneficiaries against principal and deduct such amounts on the federal estate tax return. In many instances, deducting administration expenses for federal estate tax purposes will have no tax benefit, only tax detriment. Amicus presumes that the Commissioner of Internal Revenue is aware of this result. But, Amicus further submits that the government may not be aware of the Hobson's choice that it seeks to impose on executors of essentially non-taxable estates. If "net value" for purposes of 26 U.S.C. §§ 2056(b)(4)(B) and 2055 always means the gross estate less any and all expenses borne by a marital or charitable beneficiary, regardless of where such expenses are allocated under local law, and regardless of income and appreciation in asset values realized during administration, additional estate taxes will always arise.

The logical extension of the government's position in this case will in many instances produce results which stray beyond the perimeter of fairness and equity. This is because its position has the effect of creating tax where none would otherwise exist.[47]

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47. An estate incurs five tax detriments by being required to deduct administration expenses on to the estate tax return of largely non-taxable estates *e.g.* the entire gross estate passes to a marital deduction trust. First, the federal estate tax deduction has no estate tax benefit since the entire estate passes to a surviving spouse (and/or charity). Second, by foregoing the income tax deduction to avoid an increase in estate taxes, additional income taxes are imposed on the estate. Third, this not only results in income taxes which could have been avoided, but further increases the federal estate tax since the increased taxes are paid by the spouse's share. Fourth, there is also the tax-on-tax effect that results once federal estate taxes are increased. Finally, s tatutory interest is then added to the deficiency for the period beginning with the due date of the return through the date of payment.

CONCLUSION

The judgment of the Eleventh Circuit Court of Appeals in this case should be affirmed.

Respectfully submitted,

JERALD DAVID AUGUST
Counsel of Record
JAMES J. FREELAND
AUGUST, COMITER, KULUNAS & SCHEPPS, P.A.
Attorneys for Amicus Curiae
250 Australian Avenue South
Suite 1100
West Palm Beach, Florida 33401
(407) 835-9600